September 5, 2017

Dear Executive Director Parker,

Thank you for your letter of August 18, 2017. We write, as 11 Deans of California ABA-accredited law schools, in response to your letter.

Let us begin with the central point. We have been, and we remain, supportive of and willing to participate in appropriate studies relating to the bar exam, including what is now called the "Law School Bar Exam Performance Study." We very much appreciate that, as you have worked to develop this study, you have reached out meaningfully to law deans. We are grateful that the Supreme Court has asked the Bar to study this important set of issues, including why bar passage rates have changed over time, and we agree that the issue is a critical one. We start, then, by emphasizing that we favor and appreciate careful study of these issues. We also wish to say up-front that assuming we can do so in a way that adequately protects privacy under federal and state law, **all of those of us who are signatories to this letter are willing to participate in this Bar Perfomance Study.**

As we have made clear from the beginning of these conversations, however, parts of your request for data raise serious concerns about privacy. As educators, we believe it is our obligation to protect our students' privacy and, independent of that, we are required to vigorously protect their privacy under federal law by the Federal Educational and Privacy Rights Act (FERPA) (20 U.S.C. § 1232g). The Bar's request for individualized student information raises complex and novel questions under FERPA, as well as important questions about disclosure under state privacy law.

We appreciate that your letter of August 18th provides a more detailed analysis of the FERPA questions than the Bar has previously shared. Unfortunately, we do not believe that letter fully answers the questions we must resolve, with advice of our university counsel, about the applicability of FERPA to the release of this extensive and individualized information about our students. We therefore would very much like the opportunity to sit down with you and your counsel to attempt to find a path forward that adequately meets our privacy needs and also would permit us to share the individualized data that you seek. While these privacy issues are significant, we are also optimistic that, working together, we can find ways to resolve them, and we look forward to trying to do that together with you.

As your letter notes, FERPA allows the release of personal identifying information (PII) without consent to organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering **predictive tests**, or **improving instruction**. These exceptions apply if such studies are conducted in a manner that will not permit the personal identification of students and such information will be destroyed when no longer needed for the purpose for which it is conducted. (20 U.S.C.A. § 1232g(b)(1)(F) and 34 C.F.R. § 99.31(a)(6).)

However, we, and a number of our counsel, are doubtful that, as a post-educational licensing exam, the bar exam counts ***as a predictive test*** for FERPA purposes. This means that, contrary to the suggestion of your letter, we cannot release PII to the Bar on that ground. In addition, we have been advised that the ***State Bar is unlikely to count as an "educational agency or institution"*** under FERPA.

Thus, according to the counsel we have received, our focus needs to be on the "improve instruction" prong. Under this prong, the key questions are: (1) is this study ***for or on behalf of*** an educational agency or institution, that is, is it ***for on behalf of our schools***? and (2) Is this study for the purpose of ***improving law school instruction***?

We wish to reiterate that we do believe this study is useful research. But as we understand FERPA, our belief that the research is useful information for our state to have is not enough. The statute requires that the study be "for or on our behalf" and that its purpose be to "improve instruction." [1] We and our counsel do not yet have enough information to answer these questions affirmatively, but we are eager to work with you to reach resolution.

With respect to whether this study is "for or on our behalf," we need additional information about our continued role, if any, into study design and data analysis. We appreciate the input that you have already sought, but that input related solely to what information the Bar should collect from our schools. As you point out, we do not need to be in full control of the design nor do we need to agree with the results, under FERPA's definitions, but we believe we do need additional knowledge and involvement. For instance, as of now, we have no idea how the State Bar intends to use the data that we submit. Will it be merged with other data that the Bar possesses? In addition, we do not know what information you intend to provide back to us. This is relevant not only to whether this is done "on our behalf" but it is also absolutely essential for answering the second question, that is, whether the study is done for the purpose of improving law school instruction. We would welcome the opportunity to discuss the plans for analysis and for our continued involvement, and we are optimistic that you and we can reach a reasonable path forward.

Not only does the study need to be "for or on our behalf," but for this exception to apply under FERPA the study needs to meaningfully "improve instruction" for us. Because we do not yet know precisely what analysis is planned or what data we will receive from the study, we do not

[1] It is perhaps worth mentioning that while certainly important for understanding changes in bar performance over time, the "Bar Performance Study" has little direct relevance to the primary concern of establishing a valid cut score. The Performance Study seeks to identify the factors that might have contributed to the recent decline in bar passage rates in California, given that the cut score has remained the same over that time. By contrast, the cut score is intended to set a line dividing qualified from not-qualified attorneys. Knowing what factors might be correlated with the nation-wide drop in passage rates provides limited, if any, direct information to inform policy makers as to what is the proper line to draw for professional licensure based on minimum competence. We would suggest that for determining an appropriate cut score, an occupational study of California attorneys would be of more direct relevance. That said, we reiterate that notwithstanding its indirect relationship to the cut score question, we absolutely do think that the bar performance study is worthwhile, and we would be willing to participate so long as our privacy concerns can be appropriately addressed.

yet have enough information to answer this critical question. For example, an aggregate regression analysis on all bar takers from all participating schools can provide valuable state-wide insight into some of the causes of the reduction in bar passage, but it is challenging to see how, alone, it would improve instruction for individual schools. By contrast, if each school received individualized bar score results for all of its own students, to enable further internal analyses on this data, we believe this data could indeed "improve instruction" and thus meet the FERPA standard. Thus, providing us with individualized school-specific data offers one path forward on this FERPA prong (although it could raise distinct issues under the CPRA as noted below). If you are unable to provide that data back to us, there may well be workable intermediate possibilities between aggregate and individualized disclosure and we are very much open to meeting together for the purpose of determining what these might be.[2]

Next, we want to address our privacy concerns under state law. Private schools have a distinct concern about privacy related to California law. The State Bar, and state law schools, are subject to the California Public Records Act (CPRA), while private educational institutions are not. Most of California's ABA schools are private. A number of private educational institutions have serious concerns about whether participation in this study would mean that aspects of our schools' operation or school-specific results of these studies would become public. If these private schools share internal data for the purposes of this study, what would become publicly disclosable about our individual schools under CPRA? We do appreciate that SB 690 is designed to address this concern, but it is unclear what information the State Bar would share pursuant to any public records request for this data. For example, if the State Bar, as it proposes in its August 18th letter, provides the law schools with school-specific analyses, it will be important for us to understand exactly what this will include as we believe that some of this information – if aggregate rather than individualized – could well be subject to public disclosure under SB 690 and the CPRA.

Private law schools, as well as the public schools, would welcome further information regarding how the Bar interprets the current version of SB 690 and what it would permit and what it prohibits. Assuming SB 690 becomes law as presently drafted, can the Bar, consistent with that statute and other applicable law, provide back individualized bar scores for all of the students for whom law schools provide individualized data, presuming appropriate confidentiality strictures that could be detailed within our joint confidentiality agreement? If so, that seems like an excellent way to proceed, as that information could improve instruction and yet, as we understand it, would not face disclosure by you or by us under the CPRA. We are concerned, however, that other forms of school-specific analysis might not remain confidential under the current version of SB 690. You referred in your earlier June letter to the Deans to SB 690's "blanket privacy" provisions, but we note that SB 690 was amended in late June in a way that *no longer protects aggregate, summary or statistical data.* Would non-individualized school-

[2] If notwithstanding our best collective efforts we are unable to find appropriate resolution to this FERPA issue, we would suggest there might nonetheless be additional workable paths forward. As we understand it, the Bar already has much of the relevant data for 2008 or 2007 (LSAT, graduating GPA, perhaps other data as well). If it is in a position to make use of that data for analysis, we or you could, without difficulty, seek individualized consent going forward, for February 2018 and July 2018 bar takers. This is akin to the approach New York has taken in recent efforts to study similar questions, and we believe it would avoid the FERPA problem entirely, though this approach would also cause delay we would prefer to avoid if possible.

specific analysis be "aggregate," and hence not in fact protected from public disclosure under SB 690 (assuming it becomes law)? We currently lack a clear understanding about whether you believe this school-specific analysis would or would not be disclosable under SB 690 (both to schools themselves and to the public pursuant to a request made under the CPRA). These are critical questions and we would welcome guidance about how school-specific analysis intersects with the statute, its protections, and its limits, as well as with the CPRA.

Thank you for consideration of our views. We would be pleased to schedule a meeting to attempt to resolve these issues. It is our sincere hope that we can put to rest the privacy concerns that we have so that we can move forward with this important bar exam performance study.

Sincerely,

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Cc: Chief Justice Tani-Cantil-Sakauye